FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 9 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 710

GEORGE D. TEMPLETON, on behalf of George Douglas Templeton, Jr.,
Appellant,

vs.

STATE OF CALIFORNIA,
Respondent.

APPELLANT'S PETITION FOR A REHEARING.

THOS. D. AITKEN,
605 Market Street, San Francisco, California,
Counsel for Appellant and Petitioner.

Table of Authorities Cited

Cases	Pages
Dreyer v. Pease, 88 Fed. 978	3
Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791	6, 8
State v. Milhollan, 195 N. W. 292, 50 N. D. 184	4
Twining v. New Jersey, 211 U. S. 77, 53 L. Ed. 97	4

Codes and Statutes

California Constitution, Article VI, Section 24	2
Penal Code, Sections 1016, 1020, 1026	3, 7, 8
United States Constitution, Article XIV	3, 5, 6, 8

Texts

7 R. C. L. 1043, Section 76	4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 710

GEORGE D. TEMPLETON, on behalf of George Douglas Templeton, Jr.,
Appellant,

vs.

STATE OF CALIFORNIA,
Respondent.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Comes now the above-named appellant and petitioner herein, George D. Templeton, and presents this, his petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

That on the 17th day of November, 1941, this Honorable Court issued its decision in these proceedings as follows:

> *Per curiam:* The motion to dismiss is granted and the appeal is dismissed because the record does not show that the federal question presented was necessarily passed on by the Supreme Court of California. Herndon v. Lowry, 301 U.S. 242, 247; Honeyman v. Hannan, 300 U.S. 14, 18; Lynch v. New York ex rel. Pierson, 293 U.S. 52.

Counsel for petitioner, being of the unqualified belief that he was entitled to a proper record and having in mind Section 24 of Art. VI of the Constitution of the State of California which provides:

> "* * * In the determination of causes all decisions of the Supreme Court and of the District Courts of Appeal shall be given in writing, and THE GROUNDS OF THE DECISION SHALL BE STATED." (Capitals mine.)

and feeling that due process of law, at least in the State Supreme Court would be accorded petitioner, secured from this Honorable Court two thirty day extensions of time within which to file this petition or any other appropriate one, during which periods of time counsel hoped to successfully persuade said State Supreme Court, that since it was petitioner's constitutional right to a written decision which stated the reasons therefor, that Court in conformity with its constitutional duty should supply what was lacking in the form of an appropriate certificate to this Court. This the Court has refused to do.

Counsel's subsequent efforts to elicit information concerning the reasons underlying the Court's denial

in order to remedy any errors he, himself, may have committed, produced the following suggestions:

(1st) That since the denial by the trial Court to permit during the trial of the issue of "Not Guilty", the introduction of evidence for the purpose of disproving intent and implied malice by showing that the accused had neither "sound mind and discretion" nor an "abandoned or malignant heart", was mere error curable by appeal or, if acquiesced in by the State Supreme Court, mere error of law on the part of both Courts, and that it was immaterial that the procedure was required by the Code sections 1016, 1020, and 1026; that therefore there was no federal question.

(2nd) That the accused failed to prosecute an appeal to the State Supreme Court from the verdict of the jury in the trial Court.

Even if required, such an appeal would have been only a useless gesture since the State Supreme Court had already declared the law. It was not an open question in the State. An appeal just to have the Court reiterate its already declared opinion was not necessary. *Dreyer v. Pease,* 88 Fed. 978.

For the purpose of this motion let us assume that there were a dozen similar reasons that induced the California Supreme Court to deny petitioner's petition for the issuance of a writ of habeas corpus.

We respectfully suggest that the federal question of whether or not petitioner was accorded a trial by DUE PROCESS OF LAW as guaranteed him by the XIV Amendment of the federal Constitution was necessarily

decided by the Supreme Court of the State of California in the decision appealed from for these reasons:

The trial Court had jurisdiction to try the accused (Petitioner herein), ONLY by due process of law; lacking due process it wholly lacked jurisdiction.

No failure to appeal or other failure or consent could confer jurisdiction on the Court to try and condemn. It is so stated at 7 R. C. L. 1043, Sec. 76.

> "* * * the jurisdiction of a Court over the subject-matter of a cause of action must be conferred by law, and it cannot under any circumstances be conferred on a Court, as such, by the consent of the parties. It naturally follows that if jurisdiction cannot be conferred by consent, the want thereof cannot be waived by any act of the parties."

"Due process requires that there shall be notice and opportunity for hearing given the parties." *Twining v. New Jersey,* 211 U. S. 77 at 111, 53 L. Ed. 97 at 111; that an accused be given a "fair opportunity to be heard before the issues are decided" (id.), "and an adequate opportunity has been afforded him to defend". (id.)

> "The word 'hearing' contemplates not only the privilege to be present when the matter is being considered, but the right to present one's contentions, and to support the same by proof and argument."
>
> *State v. Milhollan,* 195 N. W. 292, 50 N. D. 184.

The *record* before this Supreme Court shows:

That when arraigned petitioner objected to the procedure imposed upon him and invoked the protection accorded him by the federal constitution as follows:

> "the procedure imposed on the accused under Sections 1016, 1020, 1026 and 1026a of the Penal Code, as in violation of Section 7 (which confers a right to a trial by an impartial jury) and Section 13 (the due process of law clause) of art. I of the State Constitution, and also as A VIOLATION OF THE VI AND XIV AMENDMENTS OF THE FEDERAL CONSTITUTION." (R. 63.)

Again during the trial of the issue of not guilty accused offered evidence to prove his insanity in order to disprove the presumed "intent", i.e. the existence of a "sound mind and discretion"; the presumed implied malice, i.e. the existence of "a wicked and malignant heart" (a mental condition), and to prove a weakened intellect in mitigation of punishment as permitted by Section 1105, Penal Code.

The exclusion of this proffered evidence was objected to as set forth at pages 64-66 of the record herein and he again invoked the protection of the XIV Amendment of the federal Constitution as to due process of law.

The *record* further shows that upon resumption of the trial on the plea of "Not Guilty by reason of Insanity", accused again objected to the procedure as not due process of law and again invoked the pro-

tection of the Constitution of the United States in appropriate language. (R. 68.)

Thus the requirement of this Court that the federal question or rather that the protection of the federal Constitution must be invoked in the lower Court, has been amply accomplished in this case. The Attorney General of California makes no effort to controvert any of the facts hereinabove stated.

We now arrive at the crux of our argument and the point that we have been leading up to as the main basis for this motion.

The record shows that petitioner herein was not accorded a hearing upon his trial in the Superior Court of the State of California according to the requirements of due process of law. He was not permitted to defend himself by offering evidence that would disprove the existence of the factual ingredients of the crime, without which there could be no crime. The existence of these facts was *conclusively* presumed. Nor was he permitted to offer evidence of an impaired mentality in mitigation of punishment as permitted by Section 1105, Penal Code.

Therefore due process of law was denied him. (It is now well settled that the action of a Court in the execution of its laws may constitute State action within the purview of the XIV Amendment. *Mooney v. Holohan,* 294 U. S. 103, 79 L. Ed. 791.) Therefore the Court had no jurisdiction to try and condemn him. Consequently, it must be immaterial what reasons actuated the trial Court in the first place, and

what reasons actuated the California Supreme Court in this case, the fact is undeniable that petitioner has been condemned and imprisoned without due process of law contrary to the prohibition of the federal Constitution, the protection of which was duly and timely invoked, and that *all* of *this is shown by the record.*

We earnestly urge that whatever horn of the dilemma be seized, to wit: whether petitioner's freedom be claimed as denied by reason of judicial errors of the trial Court and concurred in by the State Supreme Court without reference to Sections 1016, 1020 and 1026 of the Penal Code, or claimed as denied by virtue of those sections which are likewise claimed by the State to not infringe on the federal Constitution, the fact stands out undeniably that in either event petitioner was not accorded his constitutional right to a trial by due process of law.

The federal question *as described by counsel* both for petitioner and for the State is: whether the procedure provided for by Sections 1016, 1020 and 1026 of the California Penal Code accorded petitioner a trial by due process of law. The federal question shown by *the record* is whether petitioner had been tried and condemned by due process of law. A decision could be written by this Supreme Court which could state exactly what the accused's rights were in the premises as required by due process of law without even mentioning Sections 1016, 1020 and 1026. Such a decision would show perforce that those sections did not afford a trial by due process of law;

therefore that, they were repugnant to the XIV Amendment of the federal Constitution.

We say this not as a suggestion but to indicate that a refusal to review in these proceedings would appear to be based rather on form than substance. I know of no case when this Supreme Court, in a case involving the life or liberty of a citizen has not refused to cast aside the form for the substance.

It is true that the State Supreme Court in these proceedings has not said *in words* that it refused relief to petitioner because the procedure imposed upon him was based on Sections 1016, 1020 and 1026 of the Penal Code and that those sections were not repugnant to the XIV Amendment but it *did* deny him relief after his showing that he was tried and condemned *without due process of law* upon a procedure objected and excepted to and after his invoking the protection of the Constitution of the United States. That was error on the part of the State Court involving the question of whether or not there had been the due process demanded by the XIV Amendment. Appeal certainly must lie from that error because the federal question is involved no matter from what angle it is examined.

This Supreme Court is in accord with this view, according to the reasoning in the case of *Mooney v. Holohan,* 294 U. S. 103, 79 L. Ed. 791. This Court indicated in that case that Mooney should urge by way of petition for habeas corpus to the California Supreme Court the reasons that he was urging for

such a writ in the Supreme Court of the United States, as he should first exhaust his remedies in the State Courts. Failing then, this Court intimated that he was free to apply for a writ of habeas corpus here.

In this case we have exhausted our remedy in the State Courts where the same constitutional protection was demanded as we urge here. There is no practical difference under the circumstances between getting before this Court by an appeal or by an original petition for habeas corpus.

Exactly the same grounds exist—a deprivation of liberty without due process of law in a case where the protection of the Constitution of the United States had been duly and properly invoked.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Supreme Court of California be, upon further consideration, reversed.

Dated, San Francisco, California,
February 4, 1942.

Respectfully submitted,
THOS. D. AITKEN,
Counsel for Appellant and Petitioner.

(NOTE): See Appendix to Jurisdictional Statement for verbatim copy of proceedings on arraignment.

CERTIFICATE OF COUNSEL.

I, Thos. D. Aitken, Counsel for the above-named George D. Templeton, do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay.

Dated, San Francisco, California,
February 4, 1942.

THOS. D. AITKEN,
Counsel for Appellant and Petitioner.